

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	Criminal No. 01-335
	:	
PHILIP AIKENS	:	

MEMORANDUM

WALDMAN, J.

October 22, 2001

I. Background

Defendant is charged with Hobbs Act robbery, theft from an interstate shipment of \$115,000 worth of Modells sporting goods and brandishing a firearm during a crime of violence in connection with the theft of a trailer truck from the premises of Eastern American Transport and Warehousing ("EATW") on February 20, 2000 after confining a security guard at gunpoint.

Defendant has moved to suppress as evidence a portion of the stolen items seized pursuant to search warrants from two locations where defendant resided, as well as a handgun recovered from one of the residences, on the ground that the affidavits supporting the warrants failed on their face to demonstrate probable cause. Defendant has also moved to suppress as evidence statements he made to Philadelphia police detectives on March 1, 2000 on the ground that they were the fruit of an unlawful arrest earlier that day. Defendant further moved to suppress as evidence statements he made to two individuals with whom he was incarcerated on the ground they were obtained in violation of his Sixth Amendment right to counsel. The court reviewed the

affidavits supporting the search warrants which are identical, and conducted a hearing at which each side presented testimony.

II. Facts

The affidavits for these search warrants recount the events at EATW in the early morning hours of February 20, 2000, including the fact that two men in ski masks, one armed with a handgun, had stolen a trailer truck with \$115,000 worth of Modells merchandise and that the truck had been recovered two days later without any merchandise. The affiant recounted that on February 23, 2000 an officer in the 26th District had advised him that he and another officer had received information from a confidential informant on February 17, 2000, three days before the robbery, that an individual named Phil Aikens was planning to rob a trucking establishment of some Modells merchandise.

The affiant further related that on February 24, 2000 he spoke with this informant who stated to him that defendant had told the informant that he was going to rob a trucking company he worked for. The informant identified defendant from a photograph and related the two addresses at which defendant variously resided.¹

¹The informant was Gary McKeen, a juvenile who had been arrested on February 17, 2000 for burglary and then provided officers with information about other crimes he knew about. Mr. McKeen is not identified by name but it is apparent from the affidavits that the informant was known to the two officers at the 26th District and personally knew the defendant.

The affiant related that a police officer then independently determined that the defendant did reside at the addresses identified by the informant, one of which was his grandfather's apartment and the other his mother's house. The affiant also determined on February 24, 2000 that the defendant was currently employed at the EATW terminal at which the crime occurred and had listed his residence with his employer as one of those identified by the informant.

The affidavit was executed, the search warrant obtained and the search conducted on February 24, 2000. The warrant was issued for Modells merchandise, a handgun, ski masks and other evidence relating to the described robbery.

Based upon the evidence presented at the suppression hearing, the court also finds the following facts.

At 5:30 p.m. on March 1, 2000 Joseph Zawacki, an Amtrak police officer of 11 years, was in a marked car at a stop light in Northeast Philadelphia when he was approached by a male in his early 30s who exited a nearby red pickup truck. The individual pointed north to a Chevrolet Monte Carlo with an Irish flag on a pole sticking out from the window and said that the people in that car were wanted by the police. The individual was very excited and did not respond when Officer Zawacki asked if he knew precisely what they were wanted for. Officer Zawacki concluded that the individual was credible. The traffic light then changed and Officer Zawacki proceeded in his vehicle to look for the

Monte Carlo. The red pickup truck followed him for at least some period of time.²

Officer Zawacki spotted the Monte Carlo turning left onto Grant Avenue from State Road and was following the vehicle when he saw two Philadelphia police officers stopped at the scene of a traffic accident. He approached the officers and related to them what he had been told.

These officers were James Snyder and Timothy Becker. They had pulled over at the scene of an accident at Grant Avenue near Jane Street to see if the attending officer needed help. From that location Officer Snyder saw a Chevrolet Monte Carlo drive past with a large Irish flag protruding from the window, dark tinted windows and a blue registration sticker which the officer recognized to be expired as the current stickers were white. If he had not been assisting at the scene of an accident, Officer Snyder would have then pursued and stopped the Monte Carlo because of the expired tag.³ Officer Becker had also

²Officer Zawacki did not record the license number of the truck although this may not have been apparent to the excited tipster.

³The registration sticker on defendant's vehicle was in fact an expired blue 1999 sticker. The court would so find based on Officer Snyder's testimony which the court credits, even in the absence of the actual license plate which was produced after the initial hearing. The court does not find credible defendant's testimony that the license plate had a then current white 2000 registration sticker which he had affixed after purchasing it from an unknown individual at a playground. Defendant acknowledged that he had stolen the license plate affixed to his vehicle from an automobile in a junk yard.

observed the vehicle and would himself have pursued and stopped it for speeding if he had not been preoccupied at the accident site.

Moments later, Officers Snyder and Becker were approached by Officer Zawacki who told them that the persons in the Monte Carlo were wanted by the police. Each officer then got into his respective marked police car and proceeded after the Monte Carlo. When the Monte Carlo turned left onto Fordham Road from Grant Avenue, Officer Snyder pulled in front of it and Officer Becker pulled in behind it. Officer Snyder approached the driver's side and Officer Becker approached the passenger's side.

Officer Snyder asked the driver for a driver's license and owner's card. He did not produce them. Officer Snyder asked the driver for his name. He was hesitant and declined to give his name. Only after Officer Snyder persisted did the driver identify himself as Thomas Aikens. In the meantime, the passenger in the vehicle, Timothy Chase, told Officer Becker that the driver's name was Philip Aikens, the defendant in this case. The officers instructed the driver and passenger to exit the vehicle. Officer Snyder patted down the defendant because of a reasonable concern for his safety based on the information received from Officer Zawacki, the lack of identification, defendant's nervousness and reluctance to provide his name.

Officer Becker asked a dispatcher to check the license plate number on the Monte Carlo. The dispatcher then responded that the license plate had been reported stolen and that the individuals were wanted for questioning in connection with a homicide. At about 6:30 p.m., the officers placed defendant under arrest for possession of the stolen license plate and transported him and Mr. Chase to the Homicide Division at Eighth and Race Streets where they arrived at about 7:00 p.m.

At the Homicide Division, defendant was interviewed by Detective Steven Buckley in connection with two murders during a robbery at a Dollar Store at Franklin Mills. Detective Buckley read defendant his Miranda rights and the defendant agreed to speak with him. The defendant was not handcuffed and was alert although a little nervous. The defendant never asked for an attorney or to use a telephone.

After speaking with defendant, Detective Buckley concluded that he was not involved in the murders. The Detective then learned that Mr. Chase, who was interviewed separately by Detective Egenlauf, had implicated defendant in the robbery of the truck and Modells merchandise. At the request of his supervisor, Sergeant William Britt, Detective Buckley called Northeast Detectives to relate the information supplied by Mr. Chase about the robbery. He spoke with detective James Boyle. Detective Boyle and Detective John McCrossin then drove from

Northeast Detectives to the Homicide Division where they arrived at about 10:00 p.m.

Detective Boyle interviewed Mr. Chase, at times with Detective McCrossin present. Detective Boyle read Mr. Chase his Miranda rights which he waived. Mr. Chase related to Detective Boyle that the defendant had been involved in the robbery of the Modells merchandise and ultimately signed a three-page statement setting forth his knowledge of the matter.

Detective McCrossin then interviewed defendant in a separate interview room. The defendant was not handcuffed. Detective McCrossin read the defendant his Miranda rights from a police form provided for this purpose. Defendant, who was not a stranger to the criminal justice system, agreed to speak with the detective. He did not request a lawyer or ask to use a telephone. No threatening or coercive tactic were employed. Defendant told Detective McCrossin that he had not actually committed the robbery but had set it up by giving directions to those who did. Defendant then signed a written statement to this effect.

Defendant was then charged with robbery, theft and possession of the stolen license plate. He was transported to Northeast Detectives where he arrived shortly after midnight. The detectives released Mr. Chase and drove him home.

On March 2, 2000, Philadelphia police officers arrested Mark Perri for burglary. He was taken to Northeast Detectives where he was placed in the same holding cell as defendant whom he did not know. It is standard procedure to put a minimum of two detainees in the same cell as a suicide precaution. Defendant and Mr. Perri briefly discussed their respective cases with each other at which time defendant made inculcating statements about the truck robbery. Mr. Perri decided to plead guilty and started to cooperate with authorities in October 2000. At that time he related his conversation with defendant the prior March to police officers.

On February 26, 2000, Philadelphia police officers arrested Kirke Szawronski for armed robbery. Mr. Szawronski was subsequently charged in April 2000 by federal authorities with six counts of Hobbs Act robbery and two firearms offenses to which he pled guilty in June 2000. Mr. Szawronski began to cooperate with the FBI on May 12, 2000 and during numerous following proffer sessions provided information on many other crimes. At one such interview in June 2000, Mr. Szawronski related that he met defendant when the two had shared a cell during the week of March 10, 2000 at the Curren-Fromhold Correctional Facility ("CFCH"), and defendant had implicated himself in the robbery of the Modells merchandise and related that he had pulled a gun on a guard.

FBI Special Agent Michael Parmigiani was the Szawronski case agent. When he began to cooperate and periodically thereafter, Agent Parmigiani stressed to Mr. Szawronski that he should not seek information from anyone in custody and should not speak with any person charged about that person's case or his own. Agent Parmigiani told Mr. Szawronski to keep his ears open but to stay quiet and not to ask questions of anyone. This reflected Agent Parmigiani's standard practice in dealing with cooperating individuals.

Mr. Szawronski next saw defendant briefly in June 2000 at the Federal Detention Center where Mr. Szawronski was then housed and where defendant was being held pending a federal court hearing. The two had a brief conversation which Mr. Szawronski later related to federal authorities. By this time Mr. Szawronski had agreed to cooperate.

Mr. Szawronski again encountered the defendant at the Federal Detention Center in March 2001 while the two were housed for a period in the same unit. Mr. Szawronski was agitated and fearful because by this time he had provided information about defendant's involvement in the Modells robbery. Defendant initiated the first conversation and the two spoke with each other several times thereafter. Mr. Szawronski asked the defendant no questions about his pending case. Defendant volunteered certain inculpatory information including a remark

that upon learning from his attorney of Mr. Chase's statement to the police on March 1, 2000, defendant paid Mr. Chase to take a "vacation." Mr. Szawronski promptly alerted Agent Parmigiani and expressed his concern about being housed with defendant. The U.S. Attorney's Office then sent a so-called separation letter to the Bureau of Prisons and the two were separated.

III. Discussion

A defendant's challenge of probable cause to search the residences is a facial one, the inquiry is limited to the four corners of the affidavits. See U.S. v. Gladney, 48 F.3d 309, 312 (8th Cir. 1995); U.S. v. Jones, 994 F.2d 1051, 1055 (3d Cir. 1993); U.S. v. Stanert, 762 F.2d 775, 778 (9th Cir. 1985).

Probable cause to issue a search warrant exists when it appears from a common sense review of the totality of the circumstances set forth in the affidavit that there is a fair probability fruits, instrumentalities or other evidence of crime will be found in a particular place. See Illinois v. Gates, 462 U.S. 213, 238-39 (1983); U.S. v. Hodge, 246 F.3d 301, 305 (3d Cir. 2001). Direct evidence linking the place to be searched to the crime under investigation is not required as probable cause may be based on reasonable inferences. Id. at 305-06; U.S. v. Whiner, 219 F.3d 289, 297 (3d Cir. 2000). In assessing probable cause, one may consider the type of crime, the nature of items sought and where a criminal could reasonably be expected to

maintain fruits and instrumentalities of the crime. See Hodge, 246 F.3d at 305. See also Jones, 994 F.2d at 1056 (recognizing firearms and clothing are types of evidence suspect is likely to maintain at his residence).

In the instant case, the pertinent information was provided to officers in face to face meetings with the informant. See U.S. v. Valentine, 232 F.3d 350, 354 (3d Cir. 2000) (noting enhanced credibility of informant who provides face to face information to police who can assess first hand his demeanor and credibility); U.S. v. Canfield, 212 F.3d 713, 719 (2d Cir. 2000) (noting enhanced credibility of face to face informant who faces greater risk if police determine his information is false).

The information provided was based upon the informant's personal knowledge. The police corroborated the informant's knowledge of defendant with a photographic identification and independently verified the informant's information regarding defendant's employment and residence. Also, critical information provided by the informant was predictive. He was told by defendant that he was planning a robbery of a type which then occurred. There is no indication that the informant was aware the robbery had occurred by the time he related his information to the police. If he had, there is every reason to assume he would have appreciated the increased value of his information and stated that his knew who had committed an armed robbery. The

searches were executed very shortly after the robbery and the items sought are of a type which the perpetrator could reasonably be expected to maintain at his place or places of residence.

The affidavits provided a "substantial basis" for a finding of probable cause. Gates, 462 U.S. at 238.⁴ At a minimum, the affidavit was not so lacking in indicia of probable cause as to render objectively unreasonable the reliance of a reasonably well trained officer on the commissioner's determination of probable cause and authorization of the warrant. See U.S. v. Leon, 468 U.S. 897, 922-23 & n.23 (1984); Hodge, 246 F.3d at 307; U.S. v. Williams, 3 F.3d 69, 74 (3d Cir. 1993).

Probable cause to arrest exists when there is a reasonable basis for an officer to believe that an individual has committed or is committing an offense. See U.S. v. Kithcart, 134 F.3d 529, 531 (3d Cir. 1998). For purposes of probable cause, the knowledge of one law enforcement officer is imputed to others who are assisting or cooperating with him. See U.S. v. Andreas, 463 U.S. 765, 771 n.5 (1983). See also U.S. v. Ferreira, 821 F.2d 1,5 (1st Cir. 1987). Police may detain a motorist upon probable cause to believe he has committed a civil traffic

⁴The "substantial basis" standard as articulated in Gates has been equated to a clearly erroneous standard and is, in any event, quite deferential. See U.S. v. Conley, 4 F.3d 1200, 1205 & n.2 (3d Cir. 1993).

violation, regardless of the subjective intention of the officer. See Whren v. U.S., 517 U.S. 806, 813-14 (1996).⁵

Officers Snyder and Becker had probable cause to stop defendant on March 1, 2000 for operating a vehicle with an expired registration, and also to arrest him for possession of a stolen license plate upon receiving the report of the dispatcher. The subsequent interviews of defendant were lawful and their fruits constitutionally admissible as evidence.

At each pertinent point defendant was advised of his Miranda rights and agreed to speak to detectives without ever asking for counsel or to use a telephone. Defendant was alert. He was not a stranger to the criminal justice system. No threatening or coercive tactics were employed. His will was not overborne in any way. His statements were voluntary.⁶

⁵Police may also stop a person when they have a reasonable and well grounded suspicion he is wanted in connection with a completed crime. See U.S. v. Hensley, 469 U.S. 221, 229 (1985). Officer Sawacki had assessed as credible the face to face report he had received that defendant was wanted by the police. Given the mobility of defendant at the time, Officer Zawacki reasonably made a quick decision to follow defendant's vehicle and relay the information to the first Philadelphia police officer he encountered. While that officer reasonably could have briefly stopped defendant to ascertain his identity and verify if he was wanted for a crime, Officer Snyder had an independent basis on which to stop defendant.

⁶That the intermittent interviews of defendant occurred over a five and a half hour period does not render them involuntary. See U.S. v. Montgomery, 14 F.3d 1189, 1196 (7th Cir. 1994); Jenner v. Smith, 982 F.2d 329, 334 (8th Cir. 1993); Parker v. Turpin, 60 F. Supp. 2d 1332, 1374 (N.D. Ga. 1999); U.S. v. Frank, 8 F. Supp. 2d 284, 303 (S.D.N.Y. 1998).

The government cannot intentionally create a situation likely to induce a detainee to make incriminating statements without the assistance of counsel. An informant, however, may operate as a passive listener and relate to investigators or prosecutors unsolicited statements of a fellow detainee.

See Kuhlmann v. Wilson, 477 U.S. 436, 459-60 (1986); U.S. v. Watson, 894 F.2d 1345, 1347-48 (D.C. Cir. 1990).

Neither Mr. Perri nor Mr. Szawronski were instructed to elicit information from defendant. Indeed, Mr. Szawronski was expressly directed by Agent Parmigiani not to so do. Defendant and Mr. Perri were briefly placed in the same holding cell merely by happenstance based on the time each was independently arrested. The government did not intentionally arrange for the placement of defendant in proximity to Mr. Szawronski. Indeed, the FBI and U.S. Attorney were upset to learn that the two were confined in the same unit following Mr. Szawronski's cooperation.

Neither Mr. Perri nor Mr. Szawronski deliberately elicited incriminating information from defendant. They merely reported information defendant volunteered to them.

IV. Conclusion

The search of defendant's residences did not violate the Fourth Amendment. Defendant's detention and arrest on March 1, 2000 was lawful. The statements to detectives which defendant seeks to suppress were made voluntarily and after his waiver of

Miranda rights. The statements of defendant to Mr. Perri and Mr. Szawronski were not obtained in violation of the Sixth Amendment.

Accordingly, defendant's motion to suppress will be denied. An appropriate order will be entered.

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UNITED STATES OF AMERICA	:	
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	:	
PHILIP AIKENS	:	

O R D E R

AND NOW, this day of October, 2001, upon
consideration of defendant's Motion to Suppress Physical Evidence
Seized and Statements Made, defendant's Motion to Suppress
Statements in Violation of his Sixth Amendment Right, and the
government's omnibus response thereto, following a hearing on
said Motions and consistent with the accompanying memorandum, **IT**
IS HEREBY ORDERED that said Motions are **DENIED**.

BY THE COURT:

JAY C. WALDMAN, J.